Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

IN RE

GEANA J. DUNKIN

AND

DAVID L. SMITH

PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION

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QUESTIONS PRESENTED FOR REVIEW

Whether the Clerk of the Supreme Court may refuse to receive or file a petition for a writ of certiorari on the ground that the Supreme Court lacks jurisdiction under 28 U.S.C. § 1254(1).

Whether the Clerk of the Supreme Court may refuse to receive or file an application addressed to an individual Justice on the ground that an individual Justice has no authority to review an order entered by the full Court.

PARTIES

Geana J. Dunkin, Petitioner

David L. Smith, Petitioner

William K. Suter, Clerk of the Supreme Court of the United States, Respondent

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IN THE
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OCTOBER TERM, 1993

IN RE

GEANA J. DUNKIN

AND

DAVID L. SMITH

PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION

Geana J. Dunkin and her attorney, David L. Smith, hereby file the following Petition for a Writ of Mandamus or Prohibition:

ACTIONS BELOW

Reference is hereby made to the letters from the Clerk of the Supreme Court of the United States, William K. Suter, refusing to receive or file Ms. Dunkin's and her attorney's (May 18, 1994) Petition for a Writ of Certiorari

to the United States Court of Appeals for the Tenth Circuit; and refusing to receive or file Ms. Dunkin's and her attorney's (July 6, 1994, July 15, 1994, and July 28, 1994) applications addressed to the Honorable Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States, and Circuit Justice for the United States Court of Appeals for the Tenth Circuit.

JURISDICTION

On June 2, 1994, the Clerk of the Supreme Court refused to receive or file Ms. Dunkin's and her attorney's (May 18, 1994) Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit on the ground that the Supreme Court lacks jurisdiction under 28 U.S.C. § 1254(1). The Clerk subsequently refused to receive or file Ms. Dunkin's and her attorney's applications addressed

to the Honorable Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States, and Circuit Justice for the United States Court of Appeals for the Tenth Circuit, on the ground that an individual Justice has no authority to review an order entered by the full Court. The statutory provision believed to confer on the Supreme Court jurisdiction to review the Clerk's refusals by writ of mandamus or prohibition is 28 U.S.C. § 1651(a).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND.

Ms. Dunkin is a 47-year-old female citizen of the United States who was employed by Louisiana-Pacific Corporation from May 28, 1985 through May 17, 1991. During this period, Ms. Dunkin performed her job in an outstanding manner, as evidenced by the performance reviews of her supervisors, and by her promotion to the position of Personnel Director of the plants at Kremmling and Walden, Colorado, and Saratoga, Wyoming. Both before and after Ms. Dunkin's promotion, numerous comments were made by James Beldin, Dan Dilworth and Douglas Eddins demonstrating a bias against over-forty, female and/or disabled employees, and against employees who filed worker's compensation claims.

Between October of 1990 and February 4, 1991, Ms. Dunkin suffered

approximately twelve asthma attacks at work, and began receiving disability benefits in accordance with company policy. On February 25, 1991, Ms. Dunkin's initial treating physician, Dr. Gloria Zibilich, filled out and returned to the employer the form applicable to an employee with an occupational illness or injury. On February 28, 1991, Ms. Dunkin's attorney filed a worker's compensation claim on her behalf with the Colorado Department of Labor because of her employer's refusal to do so. On March 14, 1991, Carol Jacobson, the Salaried Payroll Administrator at Hayden Lake, Idaho wrote Ms. Dunkin a letter threatening to "discontinue" her disability benefits if she did not have her treating physician fill out and return the forms applicable to an employee with a nonoccupational illness

or injury. On March 27, 1991, Ms. Dunkin wrote back to Ms. Jacobson advising her that the forms she had sent were not appropriate to Ms. Dunkin's circumstances, which involved an occupational illness caused by chemicals in the work environment; and offering to give the forms applicable to an employee with an occupational illness or injury to her doctors for completion if Ms. Jacobson would send those forms to her. On April 2, 1991, Ms. Jacobson wrote back to Ms. Dunkin terminating her disability benefits effective April 1, 1991, in violation of company policy requiring continuation of salaried employee disability benefits until worker's compensation benefits become available; and enclosing the forms applicable to an employee with an occupational illness or injury.

In stark contrast to this situation, none of the more than 258 under-40 male employees at the Kremmling, Montrose or Walden, Colorado plants receiving disability benefits or worker's compensation benefits in 1988, 1989, 1990 or 1991 had their benefits terminated in violation of company policy. On May 17, 1991, Ms. Dunkin wrote a letter to Mr. Beldin resigning from her employment because of her employers' illegal age, sex and/or handicap discrimination and/or retaliation against her, and because of their retaliation against her for filing and pursuing a worker's compensation claim.

With reasonable accommodation, Ms. Dunkin could have continued to perform most of her job duties as Personnel Director in spite of her handicap; but no good faith effort was made to move her to

a location that did not require her to be exposed to formaldehyde, MDI and other chemicals. Ms. Dunkin could not continue to survive economically after her disability benefits were terminated; and she was compelled to resign from her employment in order to collect the contributions made on her behalf to the company retirement program.

After Ms. Dunkin resigned from her employment, most of her job duties as Personnel Director were assigned to two males: Don Meyers at the Kremmling plant, and David Johnson at the Walden plant. Juan Maestas, the male Personnel Director at the Montrose plant, was also assigned some of Ms. Dunkin's job duties.

On May 29, 1991, Mr. Beldin wrote Ms. Dunkin a letter purporting to offer to reinstate her and to accommodate her handicap; but no concrete proposal was

made to move her to a location that did not require her to be exposed to formaldehyde, MDI and other chemicals. Mr. Beldin's letter to Ms. Dunkin was nothing more than an attempted coverup of her employers' discriminatory and retaliatory motive to make working conditions so difficult that a reasonable person in Ms. Dunkin's position would feel compelled to resign.

On May 31, 1991, Ms. Dunkin wrote Mr. Beldin a second letter of resignation, identical to the first, in response to his insincere offer and attempted coverup. Mr. Maestas later told Ms. Dunkin that Mr. Beldin was "angry beyond description" at her for pursuing her worker's compensation claim, and that Mr. Beldin said that he would "never again hire a female personnel director."

B. PROCEDURAL BACKGROUND PRIOR TO THE TENTH CIRCUIT DISCIPLINARY PANEL'S (NOVEMBER 29, 1993) DISCIPLINARY ORDER SUSPENDING MS. DUNKIN'S ATTORNEY FROM THE PRACTICE OF LAW IN THE TENTH CIRCUIT UNTIL ALL SANCTIONS IMPOSED AGAINST HIM BY THE TENTH CIRCUIT AND THE DISTRICT COURT ARE PAID.

On February 7, 1992, Ms. Dunkin filed suit in the United States District Court for the District of Colorado, United States District Judge Edward W. Nottingham presiding. Ms. Dunkin's complaint charged defendants Louisiana-Pacific Corporation, James Beldin, Dan Dilworth, and Douglas Eddins with intentional age discrimination and retaliation under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634; intentional sex discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981a;

intentional age and sex discrimination and retaliation under the Colorado Antidiscrimination Act of 1957, C.R.S. §§ 24-34-301 et seq.; and intentional retaliation for filing and pursuing a worker's compensation claim under Colorado common law. Subject matter jurisdiction of the District Court was based on 28 U.S.C. §§ 1331, 1343 and 1367.

On July 9, 1992, Judge Nottingham held a hearing and granted the motions for protective orders filed by the defendants;[1] imposed sanctions (including

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[1]Judge Nottingham granted defendants' motions for protective orders even though they failed to show "good cause" for a protective order under Fed. R. Civ. P. 26(c). See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). Specifically, defendants failed to show that the documents and information sought to be protected were subject to any confidential information privilege.

harsh verbal reprimands) against Ms. Dunkin and/or her attorney, David L. Smith (a sole practitioner in Denver, Colorado), for refusing to sign the confidentiality agreement proposed by defendants with respect to virtually all of the documents to be produced to Ms. Dunkin in the case;[2] and required Ms. Dunkin to obtain approval for her depositions and other discovery requests from a United States Magistrate Judge as a condition precedent to conducting any discovery in the case.[3] In connection

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[2]The confidentiality agreement proposed by defendants was exceedingly broad in scope, covering virtually every document to be produced to Ms. Dunkin in the case, as well as all information obtained from such documents; and requiring her to follow burdensome and expensive procedures for use of the documents and information at depositions or at trial.

[3]Under the stipulated scheduling and discovery order signed by the attorneys for the parties and by Judge Nottingham,

with the sanctions imposed against Ms. Dunkin and/or her attorney, Judge Nottingham ordered the defendants to file their applications for attorney fees by July 13, 1992, and set a hearing for July 16, 1992, at 6 a.m., to resolve any disputed matters relating to the applications for attorney fees.

On July 16, 1992, Judge Nottingham held a hearing on defendants' applications for attorney fees, and awarded attorney fees of $4,060.00 against Ms. Dunkin's attorney only; required him to pay this amount to defendants on or before July 27, 1992; and denied his request for a stay of execution on the award of attorney fees

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and entered by Judge Nottingham on May 28, 1992, discovery, including the depositions of the parties and more than 38 witnesses, was to be completed by September 25, 1992.

pending appeal. Judge Nottingham then issued a written order awarding "an additional fee of $481.25 for defense counsel's actual attendance at the hearing on Thursday, July 16, 1992 ($175 per hour x 2.75 hours actual hearing time)," as well as a written order "protecting confidential information," and a written special order of reference to United States Magistrate Judge imposing additional burdensome and illegal conditions on Ms. Dunkin's discovery in the case. Throughout Judge Nottingham's verbal and written orders, Ms. Dunkin's attorney was attacked, vilified and reprimanded in the harshest conceivable terms. Ms. Dunkin and her attorney subsequently appealed Judge Nottingham's (July 9 and July 16, 1992) orders to the United States Court of Appeals for the Tenth Circuit.

On December 3, 1992, Judge Nottingham held a hearing and denied Ms. Dunkin's motion for reconsideration of the ruling made by United States Magistrate Judge Bruce D. Pringle on October 29, 1992, and imposed sanctions (including harsh verbal reprimands) against Ms. Dunkin and/or her attorney under Rule 602C of the Local Rules of Practice of the United States District Court for the District of Colorado and/or Fed. R. Civ. P. 37 for filing the motion for reconsideration. In his (October 29, 1992) ruling, Magistrate Judge Pringle sustained the objection of defendants' attorney, Cecil R. Hedger, to deposition questions asked by Ms. Dunkin's attorney relating to discrimination against Hispanic employees of defendant Louisiana-Pacific Corporation. At the (December 3, 1992) hearing, Judge

Nottingham acknowledged that discrimination against Hispanic employees of defendant Louisiana-Pacific Corporation was relevant to the subject matter of the pending action under Fed. R. Civ. P. 26(b); but found and concluded that Magistrate Judge Pringle's (October 29, 1992) ruling was nevertheless not "clearly erroneous" or "contrary to law" under Local Rule 602C, which included a provision requiring attorney fees to be assessed against the losing party on a motion for reconsideration of a magistrate's ruling. When Ms. Dunkin's attorney argued that the attorney fee provision of Local Rule 602C was beyond the scope of authority granted by 28 U.S.C. § 636, Judge Nottingham indicated that Fed. R. Civ. P. 37 was an alternative basis for assessing attorney fees in this situation, and ordered the

defendants to file their applications for attorney fees and costs against Ms. Dunkin's attorney only by December 8, 1992.

On December 10, 1992, Judge Nottingham held a hearing on defendants' applications for attorney fees and costs, and awarded attorney fees and costs of $1,870.93 against Ms. Dunkin's attorney for filing and pursuing the motion for reconsideration of Magistrate Judge Pringle's (October 29, 1992) ruling; required him to pay this amount to defendants on or before December 16, 1992; and denied his request for a stay of execution on the award of attorney fees and costs pending appeal. Throughout Judge Nottingham's orders, Ms. Dunkin's attorney was attacked, vilified and reprimanded in the harshest conceivable terms. Ms. Dunkin and her

attorney subsequently appealed Judge Nottingham's (December 3 and December 10, 1992) orders to the Tenth Circuit.

On February 11, 1993, the Tenth Circuit issued its unpublished order dismissing for lack of jurisdiction Ms. Dunkin's and her attorney's appeals of Judge Nottingham's (July 9, July 16, December 3 and December 10, 1992) sanctions orders; imposing additional monetary sanctions against Ms. Dunkin's attorney only for filing alleged frivolous appeals of Judge Nottingham's sanctions orders; and remanding the case to Judge Nottingham for a determination of reasonable attorney fees for each defendant for defending the alleged frivolous appeals. The Tenth Circuit subsequently denied Ms. Dunkin's and her attorney's petition for rehearing and suggestion for rehearing en banc.

On June 15, 1993, Ms. Dunkin and her attorney filed their Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, arguing that an order sanctioning counsel currently of record is immediately appealable under the collateral order exception to the final judgment rule established by the Supreme Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed.2d 1528 (1949). Ms. Dunkin and her attorney also argued that sanctions may not be imposed against counsel for filing appeals warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law. The Supreme Court subsequently denied Ms. Dunkin's and her attorney's petition for a writ of certiorari.

On July 20, 1993, Judge Nottingham lifted the stay of Ms. Dunkin's case that had been in effect since December 23, 1992, and denied Ms. Dunkin's (December 15, 1992) motion for him to disqualify himself from the case pursuant to 28 U.S.C. § 455(a). In her motion to disqualify Judge Nottingham, Ms. Dunkin argued that "what is apparent from a review of the record in this case is that while no legal or factual basis existed for imposing sanctions against the plaintiff and plaintiff's attorney, Judge Nottingham nevertheless did so over plaintiff's objections, while refusing to impose sanctions against the defendants and defendants' attorney for refusing to obey Judge Nottingham's previous orders to produce . . . the documents requested by the plaintiff, and refusing to permit the plaintiff to take the depositions of

witnesses with knowledge relevant to the case;" that "as the result of this situation, the plaintiff has been deprived of her right to pursue her lawsuit (including her right to defend against defendants' promised summary judgment motion) in accordance with the intent of Congress in passing the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., as amended by the Civil Rights Act of 1991;" that "Judge Nottingham has exceeded his jurisdiction and abused his power and discretion, in violation of Article III and the due process clause of the Fifth Amendment to the United States Constitution, and the Federal Rules of Civil Procedure, including Fed. R. Civ. P. 1;" and that "it is therefore clear that Judge

Nottingham's impartiality might reasonably be questioned in this case." Judge Nottingham denied Ms. Dunkin's motion to disqualify without addressing the merits of the motion or giving any reasons for denying it.

On July 29, 1993, Judge Nottingham held a hearing and addressed the following comments to Ms. Dunkin, who made the following response:

> THE COURT: Now, Ms. Dunkin, let me address you directly. This case is going to be tried and/or disposed of on its merits. I think that you are being very ill served by your attorney, Mr. Smith, and I want to advise you of that on the record. You've chosen this attorney and it's my view that he is not competently representing you.
>
> If you wish to have the Court appoint an attorney or if you wish to retain another attorney, I will permit that. You are entitled to the appointment--well, you're not entitled, but the Court is willing to appoint an attorney under the provisions of Tenth Circuit case law to represent you in this case. It is your choice, and if you choose to

proceed with Mr. Smith, you won't be in a position later on to complain to the Court that your case was not properly tried.

Do you understand that?

MS. DUNKIN: (No audible response.)

THE COURT: I didn't hear you.

MS DUNKIN: Yes.

THE COURT: All right. Court's in recess.

(Whereupon, at 6:37 a.m., the hearing was concluded.)

C. THE TENTH CIRCUIT DISCIPLINARY PANEL'S (NOVEMBER 29, 1993) DISCIPLINARY ORDER SUSPENDING MS. DUNKIN'S ATTORNEY FROM THE PRACTICE OF LAW IN THE TENTH CIRCUIT UNTIL ALL SANCTIONS IMPOSED AGAINST HIM BY THE TENTH CIRCUIT AND THE DISTRICT COURT ARE PAID.

On November 29, 1993, a three-judge disciplinary panel of the Tenth Circuit issued its disciplinary order holding that Ms. Dunkin's attorney had filed frivolous appeals in four civil rights cases (including Dunkin) originally filed

in the United States District Court for the District of Colorado; and suspending him from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit and the District Court are paid.[4] See In re

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[4]Before issuing its (November 29, 1993) disciplinary order, the Tenth Circuit disciplinary panel denied Ms. Dunkin's attorney's request pursuant to Section 7 of the Plan for Attorney Disciplinary Enforcement of the United States Court of Appeals for the Tenth Circuit to be heard in person in defense and in mitigation with respect to the charges being brought against him by the disciplinary panel. (See also Fed. R. App. P. 46, requiring a hearing, if requested, before taking any appropriate disciplinary action against any attorney.) In that request, Ms. Dunkin's attorney said:

> Since [Mr. Smith's] case in defense and in mitigation will require presentation of extensive evidentiary materials, including expert testimony, . . . [Mr. Smith] requests the Disciplinary Panel to vacate the hearing and oral argument set for November 12, 1993, and to hold an evidentiary hearing [emphasis in the original] at some future date after . . . [Mr. Smith]

> has been given the opportunity to prepare his case. Alternatively, . . .[Mr. Smith] requests the Panel to designate a special master for purposes of conducting an evidentiary hearing.

As the result of the disciplinary panel's denial of an evidentiary hearing to Ms. Dunkin's attorney after notice and a reasonable opportunity to prepare his case, he was unable to present expert testimony or otherwise make a proper record on the issue of whether the appeals in the four civil rights cases (including Dunkin) were frivolous; and was unable to present the financial information necessary to show that he is financially unable to pay the more than $50,000.00 in totally unwarranted sanctions imposed against him by the Tenth Circuit and the District Court.

The Tenth Circuit disciplinary panel denied Ms. Dunkin's attorney's request to reconsider whether the appeals in the four civil rights cases were frivolous, holding that "[w]e are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." [Citations omitted.] However, this holding was contrary to 10th Cir. R. 36.3, which provided that "[u]npublished opinions and orders and judgments of this court have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of

the law of the case, res judicata, or collateral estoppel;" and created an irrebuttable presumption of guilt that deprived Mr. Smith of procedural and substantive due process of law.

The Tenth Circuit disciplinary panel said:

> At oral argument, respondent admitted that he has not paid any of the sanctions that have been imposed on him by this court or the district court. David L. Smith is suspended from the practice of law before this court until all sanctions are paid. He may reapply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied.

However, since the suspension of Ms. Dunkin's attorney by the disciplinary panel is based, in part, on his alleged misconduct in the District Court for which he has already been severely sanctioned, he is being subjected to multiple excessive punishments for the same conduct, in violation of the double jeopardy provision of the Fifth Amendment to the United States Constitution.

As the further result of the disciplinary order suspending Ms. Dunkin's attorney from the practice of law in the Tenth Circuit, reciprocal discipline proceedings are now pending against him in the United States Court of

Smith, 10 F.3d 723 (10th Cir. 1993). Ms. Dunkin's attorney may apply for

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Appeals for the Federal Circuit, the United States District Court for the District of Colorado and the Colorado Supreme Court. At least three of Ms. Dunkin's attorney's civil rights cases in the United States District Court for the District of Colorado (including Dunkin) have been stayed pending resolution of these proceedings, thus punishing him before he has been convicted of any inappropriate conduct; and interfering with his clients' First Amendment right to access to the federal courts, and with their attorney-client relationship.

The disciplinary panel's disciplinary order is the subject of a separate petition for a writ of certiorari filed with the Supreme Court on March 31, 1994 (No. 93-1547). In his petition, Ms. Dunkin's attorney argues that an attorney may not be disciplined by a circuit court based on the attorney's challenge to that circuit court's view of its interlocutory jurisdiction which is in conflict with that of other circuits; that an attorney may not be suspended by a circuit court until the attorney pays all monetary sanctions assessed against him or her, where the attorney is financially unable to pay those sanctions; and that a circuit court's denial of an evidentiary hearing prior to suspending an attorney constitutes an abuse of discretion or a denial of due process.

reinstatement to the Tenth Circuit Bar "when he can demonstrate that each sanction order of this court and the district court has been satisfied." Id.

D. PROCEDURAL BACKGROUND PRIOR TO THE SUPREME COURT'S (MAY 23, 1994) OPINION IN MCKNIGHT V. GENERAL MOTORS CORPORATION.

On February 17, 1994, Judge Nottingham held a hearing and stayed Ms. Dunkin's case "pending resolution of Mr. Smith's status by the Committee on Conduct;" but did not vacate the March 28, 1994 jury trial date. Judge Nottingham then awarded immediately payable attorney fees of $17,506.50 and costs of $579.33 against Ms. Dunkin's attorney pursuant to the Tenth Circuit's (February 11, 1993) order remanding the case to Judge Nottingham for a determination of reasonable attorney fees for each defendant for defending the

alleged frivolous appeals of his sanctions orders.

On March 4, 1994, Judge Nottingham held a trial preparation conference at which the following colloquy occurred:

> THE COURT: All right, the matter is here for a trial preparation conference.
>
> Mr. Smith, can you give us, without revealing anything that you shouldn't be revealing, give us any guess as to when the matter will be resolved so that we'll know whether you're in or out of this case?
>
> MR. SMITH: No, Your Honor, I have no further information.
>
> THE COURT: Well, I can't continue, you know, to hold that trial date open. What's your position? I mean, you can't continue at this point, can you? You can't even sign a final pretrial order, or you haven't so far.
>
> MR. SMITH: I would ask for permission to sign at this point. There's been no ruling by a court one way or another as to what my status is, and all I have are some allegations.
>
> THE COURT: And you haven't paid any of the money yet; right?

MR. SMITH: You're speaking of the sanctions in this case?

THE COURT: Right. Well, this case or any other case.

MR. SMITH: No, Your Honor, I am unable to pay any sanctions.

THE COURT: All right. This trial is continued.

Mr. Hedger, I'm assuming that Louisiana-Pacific doesn't object to that. I mean, obviously at some point, the work that you've put into it will come to fruition.

MR. HEDGER: Your Honor, Louisiana-Pacific is not going to interpose an objection to the continuance of this matter, but only to note and remind the Court that on July the 29th of 1993, this Court was very direct in a personal conversation with Ms. Dunkin--

THE COURT: Right.

MR. HEDGER: --and advised her of her need to obtain new counsel. We are now in the position, Your Honor, of having certain of our witnesses who are retired, and it's getting difficult to round them up and make schedules. We would be most desirous of working with the Court in terms of setting an appropriate schedule.

I don't know yet, the Court set this matter for a three day trial and Mr. Smith, in his position in the pretrial order that he's now represented after four months he's willing to sign, thinks this case is going to be a five day trial. And there's a couple of other type of housekeeping issues that need to be addressed at some point. It doesn't necessarily have to be today, Your Honor.

THE COURT: All right. The Tenth Circuit was pretty clear. I can't understand what our disciplinary committee is having such a problem with. But they work on their own schedule and they work on a volunteer basis. So the matter is continued and as soon as Mr. Smith's status is resolved, we'll figure out where it goes.

And I intend to brook no further delay, because Ms. Dunkin's been warned clearly. She used to attend these conferences. Where is she, Mr. Smith?

MR. SMITH: She's in school, Your Honor.

THE COURT: I see.

On March 17, 1994, Ms. Dunkin filed her pro se appeal of Judge Nottingham's (February 17, 1994 and March 4, 1994)

orders, arguing that he abused his discretion by staying her civil rights case and vacating the March 28, 1994 jury trial date "pending resolution of Mr. Smith's status by the Committee on Conduct." Appellate jurisdiction of the Tenth Circuit is based on 28 U.S.C. § 1292(a)(1), which provides that courts of appeals shall have jurisdiction of appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions . . . ." The Tenth Circuit has notified the parties that it is considering summary dismissal of this appeal for lack of jurisdiction; and has requested and received briefs from the parties on the jurisdictional issue of "whether the order being appealed is an appealable order."

On May 18, 1994, Ms. Dunkin and her attorney filed their Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, arguing that the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by Judge Nottingham, as to call for an exercise of the Supreme Court's power of supervision. Ms. Dunkin and her attorney said:

> In summary, the Tenth Circuit and Judge Nottingham have imposed immediately payable monetary sanctions of $18,085.83 against Mr. Smith for filing and pursuing alleged frivolous appeals of immediately payable monetary sanctions of $6,412.18 imposed against him by Judge Nottingham. While Mr. Smith's appeals have been deemed "frivolous" because of Tenth Circuit precedent holding that interlocutory sanctions orders are not immediately appealable, a majority of the circuit courts hold that sanctions orders are immediately appealable under the collateral order exception to the final judgment rule set forth in

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). See, e.g., Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535 (3rd Cir. 1985)(leading case); Frazier v. Cast, 771 F.2d 259, 261-62 (7th Cir. 1985)(fee award imposed on attorney is appealable collateral order); TMF Tool Co., Inc. v. Muller, 913 F.2d 1185, 1189 (7th Cir. 1990)(referring to conclusion of sanctions matters as final for appealability purposes); Riverhead Sav. Bank v. National Mortgage Equity Corp., 893 F.2d 1109, 1113 (9th Cir. 1990)("A sanctions order imposed solely on a non-party to pay attorney's fees and costs falls within the collateral order exception to the finality rule and is appealable immediately as a final order."); Aetna Life Ins. Co. v. Alla Medical Servs., Inc., 855 F.2d 1470, 1473 (9th Cir. 1988)("[S]anction orders issued solely against non-party attorneys are immediately appealable"); Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 n. 5 (9th Cir. 1987)("An order imposing sanctions upon counsel, a nonparty, is final and appealable by the person sanctioned upon imposition of the sanction."); Unioil, Inc. v. E.F. Hutton & Co., Inc., 809 F.2d 548, 556 (9th Cir. 1986)(fee award against counsel is immediately appealable), cert. denied, 484 U.S. 823, 108 S.Ct. 85, 98 L.Ed.2d 47 (1987); DeSisto College, Inc. v. Line, 888 F.2d 755, 761-63 (11th Cir. 1989), cert.

denied, 495 U.S. 952, 110 S.Ct. 2219, 109 L.Ed.2d 544 (1990)(fee award against counsel appealable); Ortho Pharmaceutical Corp. v. Sona Distributors, 847 F.2d 1512, 1515 (11th Cir. 1988)("When a Rule 11 sanction directs a non-party (jointly and severally with parties to the action or alone) to pay immediately--that is, before entry of final judgment--significant attorney fees and costs, this court has jurisdiction to hear immediate appeal of the sanction order."); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1172 (D.C. Cir. 1985)(fee award against a former counsel is appealable collateral order).

Since Mr. Smith's appeals of Judge Nottingham's unwarranted sanctions orders would be permitted by a majority of the circuit courts, he is being required to pay monetary sanctions that he is financially unable to pay for filing and pursuing appeals that are not frivolous, thus depriving him of substantive due process of law. These monetary sanctions are being imposed against Mr. Smith in addition to his being suspended from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit and the District Court are paid, thus subjecting him to multiple excessive punishments for the same conduct. Despite the complete destruction of Mr. Smith's liberty and property interests in his good name,

reputation, honor and integrity, and in his right to practice law and make a living, his request for a pre-suspension evidentiary hearing was denied, thus depriving him of procedural due process of law.

Because of the reciprocal discipline provision of the Local Rules of Practice of the United States District Court for the District of Colorado, the Committee on Conduct has made a recommendation to impose identical and simultaneous discipline against Mr. Smith in the District Court. If this recommendation is adopted by the three-judge disciplinary panel of the District Court, Mr. Smith will be subjected to additional excessive punishment for the same conduct.

Meanwhile, Ms. Dunkin's civil rights case, including her jury trial date, remains stayed "pending resolution of Mr. Smith's status by the Committee on Conduct," a body of volunteer lawyers that has no authority to determine his status. Indefinitely staying Ms. Dunkin's case on this unwarranted basis while interfering inappropriately with the attorney-client relationship between Ms. Dunkin and her attorney demonstrates clearly the bias of Judge Nottingham, who abused his discretion by refusing to disqualify himself from the case pursuant to 28 U.S.C. § 455(a).

> The United States Court of Appeals for the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by United States District Judge Edward W. Nottingham, as to call for an exercise of the Supreme Court's power of supervision.

E. THE SUPREME COURT'S (MAY 23, 1994) OPINION IN MCKNIGHT V. GENERAL MOTORS CORPORATION.

On May 23, 1994, the Supreme Court issued its opinion in McKnight v. General Motors Corporation, 62 U.S.L.W. 3771 (1994) (per curiam) establishing the following standard for determining when an argument on appeal is frivolous and therefore sanctionable:

> The Court of Appeals correctly rejected petitioner's argument that § 101 [of the Civil Rights Act of 1991, 105 Stat. 1071, 42 U.S.C. § 1981 (1988 ed., Supp. IV)] applies retroactively. See Landgraf v. USI Film Products, 511 U.S. ____ (1994); Rivers v. Roadway Express, Inc., 511 U.S. ____ (1994). However, if the only basis for the order imposing sanctions on petitioner's attorney was that his retroactivity argument

was foreclosed by circuit precedent, the order was not proper. As petitioner noted in his memorandum opposing dismissal of sanctions, this Court had not yet ruled on the application of § 101 to pending cases. Filing an appeal was the only way petitioner could preserve the issue pending a possible favorable decision by this Court. Although, as of September 30, 1992, there was no circuit conflict on the retroactivity question, that question had divided the District Courts and its answer was not so clear as to make petitioner's position frivolous. [Citation omitted.]

F. THE UNWARRANTED REFUSAL BY THE CLERK OF THE SUPREME COURT TO RECEIVE OR FILE MS. DUNKIN'S AND HER ATTORNEY'S (MAY 18, 1994) PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

On June 2, 1994, the Chief Deputy Clerk of the Supreme Court mailed the following letter to Ms. Dunkin's attorney:

> Your petition for a writ of certiorari mailed May 18, 1994 from Denver was received May 20, 1994 and must be returned since it does not appear that an appeal from the February 17, 1994 order of the

United States District Court has been taken to the United States Court of Appeals for the Tenth Circuit. In order for this Court to have jurisdiction over the case, it must either be in the United States Court of Appeals or be decided by the United States Court of Appeals. See 28 U.S.C. 1254(1). The Court has no authority to review orders of an United States District Court on writ of certiorari absent the case being in the Court of Appeals.

Furthermore, this Court has once reviewed this judgment of the Tenth Circuit, their case Nos. 92-1230 and 92-1381, in your petition for a writ of certiorari No. 92-1994 which was denied by this Court by order dated October 4, 1993.

Your check in the amount of $300.00 is returned as well.

On June 9, 1994, Ms. Dunkin's attorney sent by Federal Express the following letter to the Clerk of the Supreme Court:

On May 18, 1994, I filed (by first-class mail) 40 copies of a Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, with appendix, and requested docketing of same in the United States Supreme Court. The petition invokes the

Supreme Court's jurisdiction under 28 U.S.C. §§ 1254(1) and 1651(a).

On June 2, 1994, your Chief Deputy Clerk, Francis J. Lorson, returned the petition to me, along with a letter stating that the Supreme Court has no authority to review the petition. My check for the $300.00 filing fee was also returned.

I am returning the filed petition to you for docketing. I am also returning my check for the $300.00 filing fee. Any jurisdictional issues will be decided by the Supreme Court.

On June 20, 1994, the Chief Deputy Clerk of the Supreme Court mailed the following letter to Ms. Dunkin's attorney:

The Court today entered the following order in the above-entitled case:

"The motion to direct the Clerk to file a petition for a writ of certiorari is denied."

Your check in the amount of $300.00 is herewith returned.

G. THE UNWARRANTED REFUSAL BY THE CLERK OF THE SUPREME COURT TO RECEIVE OR FILE MS. DUNKIN'S AND HER ATTORNEY'S APPLICATIONS TO THE HONORABLE RUTH BADER GINSBURG, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

On July 6, 1994, Ms. Dunkin and her attorney filed their Application for Review of Order Denying Motion to Direct the Clerk to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. Ms. Dunkin and her attorney requested the Honorable Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States, and Circuit Justice for the United States Court of Appeals for the Tenth Circuit, to grant their application, and such other and further relief as may be just under the circumstances. Ms. Dunkin and her attorney specifically requested leave to

supplement their (May 18, 1994) Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to the extent necessary to raise the issue that the orders imposing monetary sanctions against Ms. Dunkin's attorney have been rendered moot by the Tenth Circuit disciplinary panel's (November 29, 1993) disciplinary order suspending Ms. Dunkin's attorney from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit and the District Court are paid; and by the Supreme Court's (May 23, 1994) opinion in McKnight.

On July 11, 1994, an Assistant Clerk of the Supreme Court mailed the following letter to Ms. Dunkin's attorney:

> The full Court on June 20, 1994 denied your motion to direct the Clerk to file a petition for a writ

> of certiorari. A single Justice has no authority to review an order entered by the full Court; therefore, your papers are herewith returned.

On July 15, 1994, Ms. Dunkin and her attorney filed their Application to Direct the Clerk to File an Application for Review of Order Denying Motion to Direct the Clerk to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. Ms. Dunkin and her attorney requested the Honorable Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States, and Circuit Justice for the United States Court of Appeals for the Tenth Circuit, to grant their application, and such other and further relief as may be just under the circumstances. Ms. Dunkin and her attorney again specifically requested leave to supplement their (May 18, 1994)

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to the extent necessary to raise the issue that the orders imposing monetary sanctions against Ms. Dunkin's attorney have been rendered moot by the Tenth Circuit disciplinary panel's (November 29, 1993) disciplinary order suspending Ms. Dunkin's attorney from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit and the District Court are paid; and by the Supreme Court's (May 23, 1994) opinion in McKnight.

On July 20, 1994, the Chief Deputy Clerk of the Supreme Court mailed the following letter to Ms. Dunkin's attorney:

> Your application to Justice Ginsburg to review the order of Court entered June 20, 1994 was

> received July 18, 1994 and must be returned since an individual Justice has no authority to review an order entered by the full Court.

On July 28, 1994, Ms. Dunkin and her attorney attempted to refile their Application to Direct the Clerk to File an Application for Review of Order Denying Motion to Direct the Clerk to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

On August 1, 1994, the Chief Deputy Clerk of the Supreme Court mailed the following letter to Ms. Dunkin's attorney:

> Your application to direct the Clerk to file an "application for review of order denying motion to direct the Clerk to file a petition for a writ of certiorari" was received again July 29, 1994 and is returned for the reasons set forth in my prior letter.

REASONS FOR GRANTING THE WRIT

While the Clerk of the Supreme Court did not have the authority to refuse to receive or file Ms. Dunkin's and her attorney's (May 18, 1994) Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, even if he did, the assumption that the case is not "in the United States Court of Appeals," as required by 28 U.S.C. § 1254(1), is incorrect for two reasons. First, under the procedure for imposing appellate sanctions established by the Tenth Circuit, Judge Nottingham was acting on behalf of the Tenth Circuit on February 17, 1994, when he awarded immediately payable attorney fees of $17,506.50 and costs of $579.33 against Mr. Smith for filing alleged frivolous appeals of his sanctions orders. See Braley v. Campbell, 832 F.2d 1504 (10th

Cir. 1987). Second, the case is "in the United States Court of Appeals" by virtue of Ms. Dunkin's pro se appeal of Judge Nottingham's (February 17, 1994 and March 4, 1994) orders staying her case and vacating the jury trial date.

Nor is the Clerk's assumption that the Supreme Court has reviewed the (February 17, 1994 and March 4, 1994) orders a correct one. Neither of these orders had even been issued on October 4, 1993, when the Supreme Court denied the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit filed by Ms. Dunkin and her attorney on June 15, 1993. Accordingly, this is clearly not a case where consecutive petitions for a writ of certiorari have been filed by Ms. Dunkin and her attorney in violation of Supreme Court Rule 44.4.

Finally, the Clerk's refusal to receive or file Ms. Dunkin's and her attorney's (July 6, 1994, July 15, 1994, and July 28, 1994) applications addressed to Associate Justice Ginsburg is an unwarranted interference with Ms. Dunkin's and her attorney's First Amendment right to access to the Supreme Court. If, as alleged in the Clerk's letters, "a single Justice has no authority to review an order entered by the full Court," then Ms. Dunkin's and her attorney's applications should have been referred to the full Court for review. The Clerk had no authority to return Ms. Dunkin's and her attorney's applications without following the procedure set forth in Supreme Court Rule 22.

More fundamentally, the orders imposing monetary sanctions against Ms.

Dunkin's attorney have been rendered moot by the Tenth Circuit disciplinary panel's (November 29, 1993) disciplinary order suspending Ms. Dunkin's attorney from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit and the District Court are paid. Under the referenced disciplinary order, Ms. Dunkin's attorney is suspended from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit and the District Court are paid. It follows, then, that Ms. Dunkin's attorney is not required to pay the sanctions imposed against him by the Tenth Circuit and the District Court if he exercises his "option" of remaining suspended. Since Ms. Dunkin's attorney is financially unable to pay the more than $50,000 in totally unwarranted sanctions

imposed against him by the Tenth Circuit and the District Court, he has been forced to exercise his "option" of remaining suspended from the practice of law in the Tenth Circuit since November 29, 1993. Under these circumstances, Ms. Dunkin's attorney is not required to pay the sanctions imposed against him by the Tenth Circuit and the District Court; and the Tenth Circuit disciplinary panel's (November 29, 1993) disciplinary order is a supervening change of law that has rendered moot the orders imposing monetary sanctions against him.

Furthermore, under the Supreme Court's (May 23, 1994) opinion in McKnight, an argument on appeal is frivolous and therefore sanctionable only if made in the face of clearly undisputed circuit precedent. In the present case, since the only basis for the orders

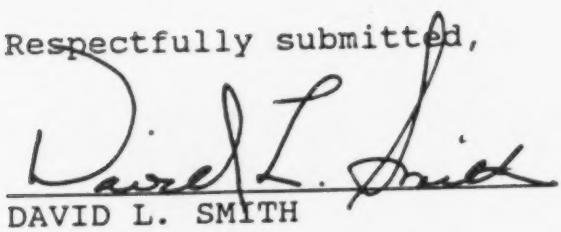
imposing monetary sanctions against Ms. Dunkin's attorney was that his argument in favor of permitting immediate appeal of interlocutory sanctions orders was foreclosed by circuit precedent, and was therefore frivolous, the orders were not proper under McKnight. At the time Ms. Dunkin and her attorney appealed the orders, the Supreme Court had not yet ruled on the issue of whether interlocutory sanctions orders are immediately appealable. Indeed, the Supreme Court has still not ruled on this issue. Filing an appeal was the only way Ms. Dunkin's attorney could preserve this issue pending a possible favorable decision by the Supreme Court. Furthermore, since there was a circuit conflict on the question of whether interlocutory sanctions orders are immediately appealable, with the majority

of circuits permitting such immediate appeal, its answer was not so clear as to make Ms. Dunkin's attorney's position frivolous. Under these circumstances, the orders imposing monetary sanctions against Ms. Dunkin's attorney have been rendered moot by the Supreme Court's (May 23, 1994) opinion in McKnight.

CONCLUSION

In conclusion, a writ of mandamus or prohibition would be in aid of the Supreme Court's appellate jurisdiction under 28 U.S.C. § 1254(1). There are present exceptional circumstances warranting the exercise of the Supreme Court's discretionary powers under 28 U.S.C. § 1651(a). Adequate relief cannot be obtained in any other form or from any other court because the Supreme Court has the exclusive authority to direct and supervise its Clerk.

Respectfully submitted,



DAVID L. SMITH

1630 Welton Street, #300
Denver, Colorado 80202
(303) 534-0153

ATTORNEY FOR PETITIONERS

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

IN RE

GEANA J. DUNKIN

AND

DAVID L. SMITH

APPENDIX TO
PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION

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ATTORNEY FOR PETITIONERS

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

GEANA J. DUNKIN,
DAVID L. SMITH,

Petitioners,

v.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,

Respondents.

ORDER ENTERED BY THE SUPREME COURT ON JUNE 20, 1994

The motion to direct the Clerk to file a petition for a writ of certiorari is denied.